UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

HOWARD EUGENE MCNIER, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 97B00072
SAN FRANCISCO STATE UNIVERSITY, COLLEGE OF BUSINESS, Respondent.	)	**Marvin H. Morse,** **Administrative Law Judge**

ORDER GRANTING COMPLAINANT LEAVE TO AMEND
(July 14, 1999)

I. Introduction and Procedural Background

This is the first Order subsequent to the May 8, 1998, Order,[1] finding that San Francisco State University, College of Business (SFSU) is an arm of the state. Contemplating the applicability of *Ex parte Young*, 209 U.S. 123 (1908), that Order invited comments by the parties. In light of their responses and further analysis of relevant and controlling precedent, this Order makes clear the parties' burdens of going forward and sets forth the standard for invoking jurisdiction and maintaining an action under the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. It should be understood that the test stated in the May 8, 1998, Order implicating *Ex parte Young* addressed evidentiary issues and is not the standard for invoking *Ex parte Young* jurisdiction.

In response to the May 8, 1998, Order, Complainant's Supplemental Brief filed on June 2, 1998, addressed the applicability of *Ex parte Young*. Complainant filed his Memorandum and Exhibits on June 5, 1998, in an attempt to provide "specified conduct by state officials and some proof of that conduct which would fall within the *Ex parte Young* exception previously briefed by Complainant."

[1] *McNier v. San Francisco State Univ.*, 7 OCAHO 998, at 1194 (1998), *available in* 1998 WL 746018 (O.C.A.H.O.).

On July 10, 1998, Respondent filed its Supplemental Memorandum of Points and Authorities in Support of Motion for Summary Decision outlining the inapplicability of *Ex parte Young*. Respondent also filed on July 10, 1998, a Declaration of Richard G. Tullis in support of Respondents' Supplemental Memorandum of Points and Authorities in Support of Motion for Summary Decision with attached exhibits.

On December 14, 1998, Respondent filed a letter-pleading which advised that the case before the Superior Court of California[2] was continued to March 8, 1999. Attached to the letter-pleading, Respondent included a copy of the "Notification of Results of Investigation" of the United States Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), regarding a complaint filed against SFSU for racial and religious discrimination by George Frankel, Howard McNier and David Angelovich. OFCCP concluded that there was no evidence that SFSU violated its "obligations under the nondiscrimination and affirmative action provisions of Executive Order 11246, as amended."

On December 14, 1998, Complainant filed a letter-pleading which addressed the OFCCP Notification, informing that he filed a "Request for Reconsideration." Additionally, Complainant filed a Motion to Compel Production of Evidence.

On April 7, 1999, Complainant filed a letter-pleading informing of the Superior Court of California verdict to which he attached the jury verdict sheet and a newspaper article discussing the verdict. The jury verdict sheet recorded the March 20, 1999, findings:

> SFSU discriminated against McNier on the basis of race, awarding him $2,752,616 in damages for discrimination; and
>
> SFSU retaliated against McNier for filing his racial discrimination complaint, awarding him $2,237,500 in damages for retaliation.

As reported on March 30, 1999, in the San Francisco Examiner at A-1, "a pretrial agreement limits the total award to the higher of the two." McNier stated in his letter-pleading that "the individuals responsible are still untouched."

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[2] On May 12, 1997, McNier filed suit in California Superior Court for the County of San Francisco charging race, age and citizenship discrimination under 8 U.S.C. § 1324b, 38 U.S.C. § 4212 and Cal. Gov. Code §§ 12940(a), (h), and (f), and retaliation for whistle blowing under Cal. Gov. Code §§ 1102.5 and 8547 *et seq*., against the Trustees of the California State University, Sim, Leong, Wallace and fifty (50) unnamed defendants.

II. Discussion

A. Grant McNier Leave To Amend the Complaint To Include Additional Respondents in Their Official Capacities at SFSU

(1) OCAHO Rules

Complainant requests leave to amend the Complaint to add Janet Sim, Arthur Wallace, Kenneth Leong, and Mark Blank as respondents in their official capacities. The pertinent rules of practice and procedure governing actions before OCAHO permit a complainant to amend a complaint to add additional respondents.

> If a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, **allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint**.

Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens, Unfair Immigration-Related Employment Practices, and Document Fraud (Rules), 64 Fed. Reg.7066, 7075 (1999) (to be codified at 28 C.F.R. § 68.9(e)) (interim rule Feb. 12, 1999) (emphasis added).

(2) Federal Rules

The Rules also state that "[t]he Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." *Id.*, at 7073 (to be codified at 28 C.F.R. § 68.1). The Federal Rules of Civil Procedure permit the joinder of parties related to claims "arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." FED. R. CIV. P. 20(a) (1998). Complainant's filings support joining the four state officials.

> Federal Rule of Civil Procedure 15(a) provides that a party may amend their [sic] complaint once "as a matter of course" before a responsive pleading is served, after that the "party may amend the party's pleading only by leave of court or by written consent of the adverse party and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Thus "after a brief period in which a party may amend as of right," leave to amend lies "within the sound discretion of the trial court."

DCD Programs Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987) (quoting FED. R. CIV. P. 15(a) and citing *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)).

(3) Ninth Circuit Case Law

> [The Ninth Circuit] has noted "on several occasions . . . that the 'Supreme Court has instructed the lower federal courts to heed carefully the command of Rule 15(a), F[ed]. R. Civ. P., by freely granting leave to amend when justice so requires.'" Thus "[r]ule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.'" This liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties. It is, however, subject to the qualification that amendment of the complaint does not cause the opposing party undue prejudice, is not sought in bad faith, and does not constitute an exercise in futility. Four factors are commonly used to determine the propriety of a motion for leave to amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment.

DCD Programs Ltd., 833 F.2d at 186 (internal citations omitted).

Although OCAHO Rules and the Federal Rules of Civil Procedure permit amending complaints to add respondents, the Ninth Circuit's four factor test must be applied to the facts in this case to determine if granting leave to amend to add respondents is appropriate. Immediately after the Answer was filed, Complainant requested that Sim, Wallace, and Leong be added as respondents. *See* "Complainant Replies to Respondent's Affirmative Defenses in Answer to Complaint" (filed March 28, 1997). Complainant requested that Blank be added as a respondent in his "Supplemental Brief" filed June 2, 1998.

(a) Bad Faith

Complainant promptly requested that Sim, Wallace, and Leong be added as respondents and timely requested that Blank be added as a respondent. In support of his request to amend in order to allege that these four state officials violated 8 U.S.C. § 1324b,[3] Complainant submitted various documents, including deposition transcripts, memoranda, letters, and e-mails. Complainant's submissions demonstrate that he is not seeking to add these respondents in bad faith. These four state officials appear to have relevant personal knowledge and experience with the events and occurrences giving rise to Complainant's allegations of discrimination and retaliation. Accordingly, because "this suit is still in its early stages, and . . . there is no evidence in the record which would indicate a wrongful motive, there is no cause to . . . den[y] . . . leave to amend on the basis of bad faith." *DCD Programs Ltd.*, 833 F.2d at 187 (footnote omitted).

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[3] References to the Immigration and Nationality Act are cited as codified in Title 8 of the United States Code.

(b) Undue Delay

Complainant's request to add Sim, Wallace, and Leong as respondents was filed the day after Respondent filed its Answer. Complainant's request to add Blank as a respondent was included in his supplemental brief filed in response to the inquiry set forth in the May 8, 1998, Order declining 8 U.S.C. § 1324b jurisdiction over SFSU. These requests to add respondents were not unduly delayed. Therefore, Complainant's motion for leave to amend to add respondents should not be denied on the basis of delay.

(c) Prejudice

"Amending a complaint to add a party poses an especially acute threat of prejudice to the entering party. Ergo, [the Ninth Circuit] has stated, '[a]voiding prejudice to the party to be added thus becomes [the court's] major objective.'" *DCD Programs Ltd.*, 833 F.2d at 187. Sim, Wallace, Leong and Blank will not be prejudiced by their addition as party-respondents in this 8 U.S.C. § 1324b action because they were put on notice of these allegations on or about May 12, 1997, when McNier filed his suit in California Superior Court for the County of San Francisco.[4] Complainant supports his Motion with excerpts from the depositions of all four officials taken in the state case that demonstrates their awareness of the allegations of discrimination and retaliation in violation of 8 U.S.C. § 1324b. "Given that this case is still at the discovery stage with no trial date pending, nor has a pretrial conference been scheduled, there is no evidence that [the state officials] would be prejudiced by the timing of the proposed amendment." *DCD Programs Ltd.*, 833 F.2d at 188.

(d) Futility

An amendment to the complaint is considered futile when it cannot be reasonably anticipated that, as a result of the amendment, the complaint would withstand a motion to dismiss. *See Griggs v. Pace American Group, Inc.*, 170 F.3d 877, 881 (9th Cir. 1999) (amending the complaint is futile when the amendment is unable to save the complaint from dismissal). The outcome of Complainant's request for leave to amend to add respondents will determine the viability of this 8 U.S.C. § 1324b action and any potential relief Complainant could be afforded for alleged discrimination and retaliation. Granting the amendment, therefore, is not futile.

(e) Amendment Is To Be Liberally Granted

> [The Ninth Circuit] has also held that "an action should not be dismissed for lack of jurisdiction without giving the plaintiff an opportunity to be heard unless it is clear the deficiency cannot be overcome by amendment." Thus, a

[4] *See supra* note 2 and accompanying text.

> motion to make an "[a]mendment is to be liberally granted where from the underlying facts or circumstances, the plaintiff may be able to state a claim.

DCD Programs Ltd., 833 F.2d at 186 (internal citations omitted).

> A pro se litigant must be given leave to amend his or her complaint unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." The rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant.

Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) (citations omitted).

(4) OCAHO Caselaw

OCAHO jurisprudence supports McNier's request to add Sim, Wallace, Leong and Blank as respondents. *See United States v. Sunshine Building Maintenance, Inc.*, 6 OCAHO 913 (1997), *available in* 1997 WL 309433 (O.C.A.H.O.) (granting motion to amend the complaint where complainant has not acted in bad faith or with undue delay, the motion is not futile, and the respondent is not unduly prejudiced by amending the Complaint.); *United States v. Creation & Innovation, Inc.*, 3 OCAHO 527 (1993), *available in* 1993 WL 403105 (O.C.A.H.O.) (granting motion to amend the complaint as it "will not be prejudicial to the public interest or to that of any of the Respondents, original or proposed."); *United States v. Mr. Z Enterprises, Inc.*, 1 OCAHO 288 (1991), *available in* 1991 WL 531710 (O.C.A.H.O.) (discussing subsequent grant of motion to amend the complaint to add respondent "based on the evidence developed at the hearing and Federal Rule of Civil Procedure 15(b).").

Because Complainant's request for leave to amend was not submitted in bad faith or with undue delay, will not prejudice the four state officials, is not futile, and should be liberally granted per relevant Ninth Circuit caselaw, the Federal Rules of Civil Procedure, and OCAHO Rules, regulations, and relevant caselaw, I grant Complainant's motion for leave to amend the Complaint to add in their official capacities as respondents, Janet Sim, Arthur Wallace, Kenneth Leong, and Mark Blank.

B. McNier Demonstrated the Applicability of the *Ex parte Young* Doctrine

The May 8, 1998, Order held that SFSU, an arm of the state, is immune from 8 U.S.C. § 1324b jurisdiction per the Eleventh Amendment to the United States Constitution. Because "[t]he Eleventh Amendment does not bar suit against university officials in their official capacity[,]" *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032 (9th Cir. 1999), the parties were asked to address whether McNier may maintain an action for prospective injunctive relief against state officials in their official capacities under the *Ex parte Young* exception to the Eleventh Amendment.

(1) *Ex Parte Young* Defined

(a) The *Young* Doctrine

The doctrine established in *Ex parte Young*, 209 U.S. 123 (1908), provides that Eleventh Amendment sovereign immunity does not bar an individual[5] from bringing suit against a state official in his or her official capacity for prospective injunctive relief in federal court.

> With one exception, state immunity from suit extends also to its agencies and officers. The Supreme Court recognized the exception in the case of Ex parte Young, in which it held that federal courts have jurisdiction over suits against state officers to enjoin official actions that violate federal law, even if the state itself is immune from suit under the Eleventh Amendment. The Ex parte Young doctrine is predicated on the notion that a state cannot authorize one of its agents to violate the Constitution and laws of the United States. A state officer acting in violation of federal law is considered "stripped of his official or representative character" and, consequently, is not shielded from suit by the state's sovereign immunity. As a result, state officials may, in limited circumstances, be subject to suit in federal court . . . .

Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1183-84 (9th Cir. 1997) (internal citations omitted).

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[5] *McNier v. San Francisco State Univ., College of Business*, addresses a private action seeking 8 U.S.C. § 1324b liability of state officials. This case should not be understood as holding that the Eleventh Amendment provides immunity from 8 U.S.C. § 1324b liability when the Office of Special Counsel for Immigration-Related Unfair Employment Practices pursues an 8 U.S.C. § 1324b action against a state or state official in a federal tribunal to vindicate the federal policy against immigration-related unfair employment practices. "[T]he federal government would not face an Eleventh Amendment bar if it chose to sue in federal court for money damages on behalf of state employees, and that the federal government could choose to remit part or all of said damages to the employees." Joanne C. Brant, *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPLOYEE RTS. AND EMPLOYMENT POL'Y J. 175, 213 (1998) (citing *Wilson Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996) (Boggs, J.) (regarding state immunity under the Eleventh Amendment and the Fair Labor Standards Act)). "[F]ederal agencies may sue states in the national courts; the Eleventh Amendment does not bar actions brought by the United States. *See United States v. Mississippi*, 380 U.S. 128, 140 (1965); *United States v. Texas*, 143 U.S. 621, 644-45 (1892)." Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and The Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 498-99 (1997) (emphasis added) (footnote added to text of quote).

In *Alden v. Maine*, 67 U.S.L.W. 4601 (U.S. June 29, 1999) (No. 98-436), the Supreme Court of the United States emphasized the critical role of the *Ex parte Young* exception to the Court's expanding view of state sovereign immunity.

> [T]he exception to our sovereign immunity doctrine recognized in *Ex parte Young*, 209 U.S. 123 (1908), is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land. . . . Had we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine.

Id., at 4613.

Because "the Ex parte Young exception to Eleventh Amendment immunity applies to violations of federal statutory rights," *Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 422 (9th Cir. 1996), an 8 U.S.C. § 1324b action is sustainable under *Ex parte Young*. *See Armstrong v. Wilson*, 124 F.3d 1019, 1026 (9th Cir. 1997) (*citing Almond Hill Sch. v. United States Dep't of Agric.*, 768 F.2d 1030, 1034 (9th Cir. 1985) ("The underlying purpose of Ex parte Young seems to require its application to claims against state officials for violations of federal statutes.")), *cert. denied*, 118 S. Ct. 2340 (1998); *Hale v. Belshe*, 117 F.3d 1425 (9th Cir. 1997), *available in* 1997 WL 377113 ("We are unpersuaded by the state officials' arguments against applying the Young exception to this action seeking a prospective remedy for an ongoing violation of federal law. Accordingly, we conclude that the state officials may not invoke Eleventh Amendment immunity . . . . ") (unpublished).

McNier's filings in response to the May 8, 1998, Order presumptively support the viability of an *Ex parte Young* action to remedy alleged violations of 8 U.S.C. § 1324b.[6] United States Supreme Court and Ninth Circuit caselaw permit Complainant to engage the *Ex parte Young* exception to maintain a § 1324b suit for prospective relief against state officials. However, recent Supreme Court decisions necessitate further inquiry into § 1324b's remedial scheme in order to determine whether the ALJ has jurisdiction over a private § 1324b action by virtue of the *Ex parte Young* exception to Eleventh Amendment sovereign immunity.

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[6] By Order dated July 3, 1997, in the present case, I outlined a regimen to be followed by Complainant in order to establish a *prima facie* case of § 1324b liability for citizenship status discrimination. *See McNier v. San Francisco State Univ., College of Business*, 7 OCAHO 947, at 425 (1997), *available in* 1997 WL 1051448, at *7 (O.C.A.H.O.).

(b) McNier May Bring an Action under *Ex Parte Young* Because No Other Remedial Scheme Is Available To Vindicate Violations of 8 U.S.C. § 1324b

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), the Supreme Court of the United States limited petitioner's ability to bring an action against a state and state officials for violating federal law. Dismissing suit against the Governor and State of Florida for lack of jurisdiction, the Court held that Congress lacks power to abrogate state Eleventh Amendment sovereign immunity when enacting a statute under its Article I plenary power to regulate commerce[7] and that *Ex parte Young* cannot be invoked when the statute at issue sets forth intricate remedial provisions. *Seminole Tribe of Florida*, 517 U.S. at 72, 74-76. As understood by the Ninth Circuit, however, "[t]he Court stated that it '[did] not hold that Congress cannot authorize federal jurisdiction under Ex parte Young over a cause of action with a limited remedial scheme.'" *Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996) (citing *Seminole Tribe of Florida*, 517 U.S. at 75 n.17). According to one commentator,

> While Seminole Tribe makes clear that the Commerce Clause does not confer upon Congress the power to abrogate [a state's Eleventh Amendment sovereign immunity], a statute passed pursuant to the Commerce Clause . . . might . . . be enforced against state officials in federal court through private actions for prospective relief, pursuant to Ex parte Young.

Joanne C. Brant, *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPLOYEE RTS. AND EMPLOYMENT POL'Y J. 175, 202 (1998).

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997),[8] the Supreme Court confirmed that it does not "question the continuing validity of the Ex parte Young doctrine." The Court, however, limited the availability of *Ex parte Young* when a state forum maintains jurisdiction to provide a remedy.

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[7] "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) (footnote omitted).

[8] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction. However, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests.").

> Our precedents do teach us, nevertheless, that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar. . . . Last Term, however, we did not allow a suit raising a federal question to proceed based on Congress' provision of an alternative review mechanism. . . . What is really at stake where a state forum is available is the desire of the litigant to choose a particular forum versus the desire of the State to have the dispute resolved in its own courts. . . . The Young exception may not be applicable if the suit would "upset the balance of federal and state interests that it embodies." The exception has been "tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights."

Coeur d'Alene Tribe of Idaho, 521 U.S. at 276-77 (internal citations omitted).

> Putting aside the acts of state officials which are plainly ultra vires under state law itself, there are, in general, two instances where Young has been applied. **The first is where there is no state forum available to vindicate federal interests**, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law. This is a most important application of the Ex parte Young doctrine and is exemplified by the facts in Young itself.

Coeur d'Alene Tribe of Idaho, 521 U.S. at 270-71 (internal citations omitted) (emphasis added).[9]

IRCA does not set forth a detailed remedial scheme to address violations by states or state officials. Title 8 U.S.C. § 1324b was enacted to fill a gap in employment discrimination law by prohibiting workplace citizenship status discrimination, an unfair immigration-related employment practice.[10] OCAHO jurisdiction provides the only forum in which to bring an action under 8 U.S.C. § 1324b for citizenship status discrimination and for retaliation arising in the

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[9] Even if there is a prompt and effective remedy in a state forum, a second instance in which Young may serve an important interest is when the case calls for the interpretation of federal law. This reasoning, which is described as the interest in having federal rights vindicated in federal courts, can lead to expansive application of the Young exception.

Coeur d'Alene Tribe of Idaho, 521 U.S. at 275

[10] *See United States v. Lasa Marketing Firms*, 1 OCAHO 141, at 952 (1990), *available in* 1990 WL 512223, at *2 (O.C.A.H.O.) (discussing IRCA's legislative history and *Espinosa v. Farah Mfg.*, 414 U.S. 86, 95 (1993), which held that "nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.").

context of the prohibited employment conduct.[11] California law does not contain a similar state statute prohibiting citizenship status discrimination and related retaliation in the workplace,[12] nor does California law provide a state forum to redress a violation under 8 U.S.C. § 1324b for citizenship status discrimination and related retaliation. Therefore, an individual seeking to bring an 8 U.S.C. § 1324b action for citizenship status discrimination may only do so before OCAHO. There is no other remedial scheme.

McNier's case is distinguishable from *Seminole* and *Coeur d'Alene* in that McNier may only prosecute his 8 U.S.C. § 1324b citizenship status discrimination and related retaliation claims before this tribunal. Both the *Seminole* and *Coeur d'Alene* disputes could be remedied by means other than an *Ex parte Young* action before a federal tribunal. Because no other federal or state tribunal has jurisdiction over § 1324b claims of citizenship status discrimination and retaliation, McNier's claims survive Supreme Court limitations on *Ex parte Young* jurisdiction. "Where there is no available state forum the Young rule has special significance." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 271.

Because all of McNier's claims against SFSU, an arm of the state of California, were dismissed in the Order of May 8, 1998, the only claims remaining are for prospective relief against state officials under the *Ex parte Young* exception to the Eleventh Amendment. As discussed, *Seminole* and *Coeur d'Alene* do not limit McNier's ability to maintain his § 1324b citizenship status discrimination and retaliation claims.

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[11] *Cf. Anderson v. Conboy*, 156 F.3d 167 (2d Cir. 1998) (holding that 42 U.S.C. § 1981 "proscribes private alienage discrimination with respect to the rights" to make and enforce contracts which overlaps with the citizenship status discrimination protections provided under IRCA at 8 U.S.C. § 1324b), *cert. granted sub nom., United Bhd. of Carpenters and Joiners*, 119 S. Ct. 1495 (Apr. 26, 1999) (No. 98-958). Although the Second Circuit held that the federal district courts can entertain citizenship status discrimination claims, this decision does not provide a state law remedial scheme.

[12] The only prohibition of citizenship status discrimination in current California law relates to emergency health services and care. *See* Cal. Health & Safety Code §§ 1317(b) ("In no event shall the provision of emergency services and care be based upon, or affected by, the person's . . . citizenship. . . ."), 1317.3(b) ("As a condition of licensure, each hospital shall adopt a policy prohibiting discrimination in the provision of emergency services and care based on . . . citizenship . . . ."), 1317.3(c) ("As a condition of licensure, each hospital shall require that physicians and surgeons who serve on an 'on-call' basis to the hospital's emergency room cannot refuse to respond to a call on the basis of the patient's . . . citizenship . . . ." (1998).

(c) State Officials Sued in Their "Official Capacity" under *Ex parte Young* Differ from Employees Sued in Their "Individual Capacity"

State officials are sued under *Ex parte Young* in their official capacities for injunctive relief to halt continuing violations of federal law, but not in their individual capacities for monetary damages. Attempting to demonstrate that Sim, Wallace, and Leong should not be added as respondents, Respondent relies on *Miller v. Maxwell's International Inc.*, 991 F.2d 583 (9th Cir. 1993) (holding liability for discrimination does not extend to individual employees).

In *Miller*, a former employee alleged discrimination and retaliation claims[13] seeking liability against a private employer and its employees in their individual capacities. The facts and underlying legal analysis of *Miller* are not analogous to McNier's action under *Ex parte Young* because McNier's action seeks only prospective injunctive relief against state actors in their official capacities. The Ninth Circuit in *Miller* stated, "[M]any of the courts that purportedly have found individual liability under the statutes actually have held individuals liable only in their official capacities and not in their individual capacities. Indeed, these courts have joined this circuit in protecting supervisory employees from liability in their individual capacities. . . ." *Miller v. Maxwell's International Inc.*, 991 F.2d at 587 (internal citations and footnotes omitted).

By limiting civil liability, *i.e.*, monetary damages, to the "employer," *Miller* protects private sector employees who are sued in their individual capacities. Actions for prospective injunctive relief against public employees, such as SFSU officials, however, are not implicated by nor prohibited by *Miller*. *Miller's* dissenting opinion notes, "Employees, however, can be sued in their official capacities, allowing a successful plaintiff to obtain injunctive relief." *Miller*, 991 F.2d at 588 (internal citations omitted) (Fletcher, J., dissenting).

Ninth Circuit case law permits recovery through prospective injunctive relief from state employees in their official capacities under *Ex parte Young*.[14]

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[13] Miller sought civil liability for discrimination and retaliation under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act.

[14] Although not significant to § 1324b claims because no damages are authorized, it is interesting that the Ninth Circuit has allowed actions against state employees in their individual capacities for damages. "We . . . have jurisdiction to hear [Plaintiff's 42 U.S.C. § 1983 discrimination] claims against the other defendants--in their individual capacities--for monetary damages. . . . A victory in such a suit is a 'victory against the individual defendant, rather than against the entity that employs him.'" *Cerrato v. San Francisco Community College District*, 26 F.3d 968, 972-73 (9th Cir. 1994) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985)). *See also Stones v. Los Angeles Community College District*, 796 F.2d 270 (9th Cir. 1986) ("Dr. Stones could still recover from the individual defendants in their individual capacity" in this action brought under 42 U.S.C. §§ 1981, 1983).

> It is well established that the Eleventh Amendment does not bar a federal court from granting prospective injunctive relief against an officer of the state who acts outside the bounds of his authority. . . . Accordingly, we may hear [Plaintiff's discrimination] claim to the extent that he asks for prospective injunctive relief from the other defendants in their official capacities (e.g., the enjoining of the SFCC affirmative action plan, **the prospective hiring of** [**Plaintiff**], etc.).

Cerrato v. San Francisco Community College District, 26 F.3d 968, 972-73 (9th Cir. 1994) (emphasis added).

> If the District is properly characterized as an arm of the state, Dr. Stones' suit to enjoin it would also be barred. However, we need not reach the Eleventh Amendment question on this record, because even were we to find that the District is shielded from suit by the state's sovereign immunity, Dr. Stones could . . . obtain prospective injunctive relief. Ex parte Young, 209 U.S. 123 . . . (1908); Quern v. Jordan, 440 U.S. 332 . . . (1979).

Stones v. Los Angeles Community College District, 796 F.2d 270, 272 (9th Cir. 1986) ("civil rights action [alleging racial discrimination] filed against the District, its chancellor and the president of Valley College . . .") (internal citations omitted).

"[T]he Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgement or injunctive relief." *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946, 952 (9th Cir. 1983) (quoting *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982)). Therefore, the Ninth Circuit supports McNier's ability to sue state officials in their official capacity for prospective injunctive relief.

Because the state employees to be added as respondents in McNier's 8 U.S.C. § 1324b action are being sued in their official capacities (not in their individual capacities) for injunctive relief (not for damages), the affirmative defense of qualified immunity is inapplicable to them. *Gonzalez v. Metropolitan Transp. Authority*, No. 96-56808, 1999 WL , at *2 (9th Cir. Apr. 14, 1999) (holding the defenses of qualified immunity and good faith "that would shield individuals from damages judgments would not [shield them to] avoid prospective relief . . . ." *); Thorn v. Nevada*, No. 98-15734, 1999 WL 170784, at *2 (9th Cir. Mar. 23 1999) ("[T]he DOT's contention that Pitlock is entitled to a defense of qualified immunity must be rejected. That defense is reserved to protect state officials sued in an individual capacity from a civil suit for damages. . . . It is, however, not available to enable Pitlock to avoid prospective enforcement of federal constitutional law.") (unpublished); *G & G Fire Sprinklers, Inc. v. Bradshaw*, 136 F.3d 587, 598 n.23 (9th Cir. 1998) ("The state also contends that the individual defendants in this case are entitled to qualified immunity. 'Qualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief.' . . . Therefore, the individual defendants cannot claim qualified immunity as an affirmative defense to this action seeking declaratory and injunctive relief.").

(2) The Standard for Maintaining an *Ex Parte Young* Action

(a) Continuing Violation of Federal Law

In order to prevail under *Ex parte Young*, McNier must establish a continuing violation of 8 U.S.C. § 1324b.

> There is an exception to [state Eleventh Amendment immunity insulating state officials against suit] under Ex Parte Young, 209 U.S. 123 . . . (1908). Under that case, if the suit involves an injunction seeking a prospective remedy for a **continuing violation of federal law**, a federal court may enjoin state officials from continuing such activity. Idaho v. Coeur d'Alene Tribe of Idaho [521] U.S. [261, 269] . . . (1997).

United Mexican States v. Woods, 126 F.3d 1220, 1222 (9th Cir. 1997) (holding Arizona and its officials immune from suit and the *Ex parte Young* exception inapplicable because the plaintiff failed to allege continuing violations of federal or international law) (emphasis added).

"Young has been focused on cases in which a violation of federal law by a state official is **ongoing** as opposed to cases in which federal law has been violated at one time or over a period of time in the past . . . ." *United Mexican States*, 126 F.3d at 1223 (quoting *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986)) (emphasis added).

> We hold that the exception to Eleventh Amendment immunity set forth in Ex parte Young . . . squarely applies to allow this action against named individuals in their official capacity. Under the doctrine of Ex parte Young, the Eleventh Amendment is no bar to "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to '**end a continuing violation of federal law**.'" Seminole Tribe v. Florida, . . . 116 S. Ct. 1114, 1132 . . . (1996) (quoting Green v. Mansour[,] 474 U.S. 64, 68 . . . (1985)). "The Young doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State." Idaho v. Coeur d'Alene Tribe, . . . 117 S. Ct. 2028, 2047 . . . (1997) (plurality opinion). Even where the relief sought may have a "substantial ancillary effect on the state treasury," a suit against state officials may proceed so long as the relief "serves directly to bring an end to a present violation of federal law." Papasan v. Allain, 478 U.S. 265, 278 . . . (1986); see also Milliken v. Bradley, 433 U.S. 267, 289-90 . . . (1977).

Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997) (footnote and citations omitted) (emphasis added), *cert. denied*, 118 S. Ct. 2340 (1998).

The issue of a § 1324b continuing violation has been addressed in OCAHO caselaw.[15]

(b) Causal Connection between Each Official and a Violation of Federal Law

McNier must demonstrate a nexus between each respondent and the prohibited conduct in violation of § 1324b. The Ninth Circuit has stated,

> The Supreme Court explained in Ex Parte Young, 209 U.S. 123, 157 (1908) that: In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that **such officer must have some connection with the enforcement of the act**, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

Los Angeles Branch NAACP v. Los Angeles Unified School District, 714 F.2d 946, 952 (1983) (emphasis added). *See also Long v. Van de Kamp*, 961 F.2d 151 (9th Cir. 1992). Accordingly, to obtain § 1324b relief against the individual respondents, McNier must show that Sim, Wallace, Leong, and Blank perpetrated, ordered, and/or enforced the prohibited discriminatory or retaliatory conduct in violation of 8 U.S.C. § 1324b.

(3) Remedies Available under Prospective Injunctive Relief

As noted, McNier's § 1324b remedies are limited to "prospective injunctive relief" as set forth at 8 U.S.C. § 1324b(g) and 28 C.F.R. § 68.52(d) (1999).[16]

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[15] *See Walker v. United Air Lines*, 4 OCAHO 686, at 816-18 (1994), *available in* 1994 WL 661279, at *15-16 (O.C.A.H.O.) (setting forth the Seventh and Fifth Circuits' continuing violation doctrine as it relates to citizenship status discrimination under 8 U.S.C. § 1324b); *United States v. Southwest Marine Corp.*, 3 OCAHO 429, at 388-93 (1992), *available in* 1992 WL 535559, at *34-37 (O.C.A.H.O.) (identifying an ongoing policy which required employees to be U.S. Citizens as a continuing violation of 8 U.S.C. § 1324b); *United States v. Weld County School Dist.*, 2 OCAHO 326, at 219 (1991), *available in* 1991 WL 531749, at *14 (O.C.A.H.O.) ("In order to find a continuing violation, I must also find a present violation of IRCA."); *United States v. Mesa Airlines*, 1 OCAHO 74, at 490-93, *available in* 1989 WL 433896, at *24-26 (finding a continuous violation of 8 U.S.C. § 1324b per Supreme Court of the United States and Tenth Circuit caselaw).

[16] Although *Los Angeles Branch NAACP* explicitly, and the *Ex parte Young* rationale implicitly, acknowledges the distinction between a suit against the state and a suit against a state official, this distinction in party-respondent effects no difference as to the available remedies or relief.

> [W]hen a plaintiff brings suit against a state official alleging a violation of federal law, the federal court may award prospective injunctive relief that governs the official's future conduct, but may not award retroactive relief that requires the payment of funds from the state treasury. . . . [A]n injunction against the state officer is permitted, even if it might require substantial outlay of funds from the state treasury, provided that it does not award retroactive relief for past conduct.

Natural Resources Defense Council, 96 F.3d at 422 (citations omitted).

(a) Reinstatement

Title 8 U.S.C. § 1324b(g)(2)(B)(viii), as implemented by 28 C.F.R. § 68.52(d)(1)(vii) (1999), provides that the ALJ may order the person or entity engaging in an unfair immigration-related employment practice "to lift (in an appropriate case) any restrictions on an employee's assignments, work shifts or movements." Relevant Ninth Circuit law instructs that "[r]einstatement constitutes prospective injunctive relief." *Doe v. Lawrence Livermore Nat'l Laboratory*, 131 F.3d 836, 840 (9th Cir. 1997).[17] "The goal of reinstatement . . . is not compensatory; rather, it is to compel the state official to cease her actions in violation of federal law . . . ." *Id*., at 841 (citing *Elliot v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986)).

(b) Consideration for Position

Remedies available under IRCA at 8 U.S.C. § 1324b(g)(2)(B)(iii), as implemented by 28 C.F.R. § 68.52(d)(1)(iii) (1999), permit the ALJ to require the person or entity engaging in the unfair immigration-related employment practice "to hire individuals directly and adversely affected, with or without back pay[.]"

C. OCAHO Case Law Includes The Selection Process When Defining Hiring

Respondent's Supplemental Memorandum filed July 10, 1998, argues that 8 U.S.C. § 1324b prohibits discrimination only when the successful applicant comes "on board." SFSU's contention is contrary to the entire thrust of § 1324b case law which holds "hiring" to be a dynamic process and acknowledges that discrimination can occur at any point at which the rejected applicant's opportunity is "substantially impaired." *United States v. Lasa Marketing Firms*, 1 OCAHO 141, at 971 n.21 (1990), *available in* 1990 WL 512223, at *20 n.21.

> [S]ection 1324b(a) should be broadly construed to include the whole pre-employment *process* and not just an actual refusal to hire or recruit. . . . . IRCA,

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[17] *See* Carlos Manuel Vazquez, *Night and Day: Coeur D'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 72-73 & 101 n.430 (1998) (commenting that cases in several circuits hold reinstatement as a form of prospective relief as permitted under *Ex parte Young*).

> on its face, states that it is an "unfair immigration-related employment practice * * * to discriminate against any individual (other than an unauthorized alien) *with respect to* the hiring, or recruitment or referral for a fee, of the individual for employment * * *" 8 U.S.C. § 1324b(a). Interpreting this choice of public language in a broadly protective and remedial way is consistent with the intent of Congress to avoid additional and unnecessary barriers or hurdles for those individuals legally residing in this country[.] . . . Accordingly, I intend to interpret and apply § 1324b(a) in a way that considers broadly the totality of the circumstances of the employment *process*, and to scrutinize each employment decision within that process for unfair immigration-related employment practices. In this regard, I intend my analysis to be guided in part by the distinction . . . between the "nullification" of employment opportunities and, what I will incorporate by reference as being the *substantial impairment* of such opportunities for reasons prohibited by section 1324b(a).

Id. See also Williams v. Lucas Associates, 2 OCAHO 357 (1991), *available in* 1991 WL 531868 (O.C.A.H.O.).[18]

OCAHO case law expands the narrow definition of "hire" provided at 8 C.F.R. § 274a.1(c)[19] for employer sanctions cases (violations of 8 U.S.C. § 1324a) for broader application in employment discrimination cases, violations of 8 U.S.C. § 1324b. When assessing an incident of discrimination, the selection process is included. "[S]ince the passage of IRCA in 1986, [an employer has not] been free to discriminate based on citizenship status in its selection process." *Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO 568, at 1660 (1993), *available in* 1993 WL 557798, at *12 (OCAHO). Consideration of McNier's discrimination claims,

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[18] [S]ummarily rejecting potential employees prior to an inquiry into their particular qualifications only to subsequently hire another applicant for the same position, constitutes a prima facie showing of unlawful discrimination. In Ostroff v. Employment Exchange, Inc., 683 F.2d 302 (9th Cir. 1982), the Ninth Circuit went further. To make a prima facie showing of employment discrimination based on impermissible grounds in prescreening cases, the job applicant need not . . . demonstrate that he or she was qualified to fill the position for which applications were being sought. "When an employer summarily rejects an applicant without considering his or her qualifications, those qualifications are irrelevant . . . ."

Williams v. Lucas Associates, 2 OCAHO 357, at 429 (1991), *available in* 1991 WL 531868, at * 5 (O.C.A.H.O.) (internal citations omitted).

[19] "The term hire means the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. § 274a.1(c) (1998).

therefore, will encompass "the totality of the circumstances of the employment *process*" and will not be limited to the date upon which Qu began working at SFSU.[20]

D. "Persons" Are Accountable for Violations of 8 U.S.C. § 1324b

According to Respondent (Supplemental Memorandum at page 12), "[t]he remedial scheme in section 1324b provides that relief can be provided only be [sic] an 'employer.' The individually named employees are . . . not 'employers' and *Ex Parte Young* is inapplicable." Respondent argues that the individually named state officials "cannot effectuate the remedies provided under section 1324b."

The answer is that 8 U.S.C. §§ 1324b(a)(1) and (5) specifically delineate that unfair immigration-related employment practices committed by a "**person** or other entity" constitute a violation of 8 U.S.C. § 1324b. 8 U.S.C. §§ 1324b(a)(1), (5) (1999) (emphasis added). Title 8 U.S.C. § 1324b(g) sets forth that the ALJ shall issue an order determining that a "**person** or entity named in the complaint" engaged in or is engaging in unfair immigration-related employment practices and requiring "the **person** or entity" to effectuate the remedies provided at 8 U.S.C. § 1324b(g)(2)(B). 8 U.S.C. §§ 1324b(g), (2) (emphasis added). Because Sim, Wallace, Leong, and Blank are "persons" as contemplated by the language and intent of 8 U.S.C. § 1324b, unfair immigration-related employment practices committed by each of them can be remedied through "official acts" as directed by the ALJ.[21]

OCAHO caselaw comports with the clear statutory language that "persons" are subject to suit for alleged violations of 8 U.S.C. § 1324b. *Boyd v. Sherling*, 6 OCAHO 916, at 1113 (1997), *available in* 1997 WL 176910 (O.C.A.H.O.) (alleging § 1324b violations against individual dentist shortly after hiring complainant); *Forden v. Griessbach*, 5 OCAHO 735, at 89 (1995), *available in* 1995 WL 325245 (O.C.A.H.O.) (alleging § 1324b violations against individual who was former supervisor); *United States v. Sargetis*, 3 OCAHO 407, at 101 (1992), *available in* 1992 WL 535547 (O.C.A.H.O.) (dismissing § 1324b claims against individual respondents only after ALJ determined not to pierce the corporate veil); *Mendez v. Daniels*, 2 OCAHO 392, at 739 (1991), *available at* 1991 WL 531903 (O.C.A.H.O.) (alleging national origin discrimination involving dispute over wages and compensation against an individual who employed complainant); *Tovar v. United States Postal Service*, 1 OCAHO 269, at 1720 (1990), *available in* 1990 WL 512217 (O.C.A.H.O.) (granting on the merits respondents' motion for summary decision in § 1324b action where respondents included five Postal Service employees in their official capacities); *Akinwande v. Weyel*, 1 OCAHO 144, at 1024 (1990), *available in*

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[20] *See infra* note 24 regarding selection process in the H1-B visa context.

[21] *See* discussion *supra* II(B)(3) ("Remedies available under Prospective Injunctive Relief."). *See also McNier v. San Francisco State Univ., College of Business*, 7 OCAHO 947, at 415-16, n.1 (1997), *available in* 1997 WL 1051448, at FN1 (O.C.A.H.O.) ("Although an individual could be liable for a civil penalty," employees sued in their individual capacity are not "empowered to offer remedial employment for another person or entity.").

1990 WL 512148, at *1-2 (O.C.A.H.O.) (alleging § 1324b violations against individual respondent, as agent for employer, in addition to employer); *United States v. Lasa Marketing Firms*, 1 OCAHO 141, at 961, 976 (1990), *available in* 1990 WL 512223, at *8, *17 (O.C.A.H.O.) (identifying individual respondent as "individually responsible for any liability found" and ordering individual respondent to pay a civil money penalty and fulfill the other obligations set forth in the order); *Sosa v. United States Postal Service*, 1 OCAHO 115, at 752 (1989), *available in* 1989 WL 433966 (O.C.A.H.O.) (granting on the merits respondents' motion for summary decision in § 1324b action where respondents included four individual Postal Service employees in their official capacities).

E. The H1-B Visa Issue

Both parties have addressed SFSU's hiring of Qu for the tenured position prior to Qu obtaining work authorization under an H1-B visa.[22] A finding that the four state officials committed discrimination and/or retaliation in violation of 8 U.S.C. § 1324b will not depend upon a holding that Qu was not work authorized at the time he was hired. Rather, Qu's visa status is one of several factors to assess when determining whether an unfair immigration-related employment practice occurred.

An offer to employ a "specialty worker"[23] on an H-1B visa is necessarily contingent upon: Department of Labor approval of the Labor Condition Application (a prerequisite to filing the H-1B petition); INS approval of the H-1B petition; and Consular Official (Department of State) acceptance of the H-1B petition and issuance of the H-1B visa. 20 C.F.R. § 655.700(b) (1999). Additionally, employment is contingent upon admission of the H-1B visa holder into the United States (or adjustment of status for an individual present within the United States). 8 U.S.C. § 1201(h). If all four of these steps are not successfully completed, the individual will not be able to commence work, invalidating the specific offer of employment.

An individual seeking work authorization under an H-1B visa is not work authorized in the United States until the issuance of the H-1B visa, setting forth the approved dates within which the individual may work for the petitioning employer in the particular specialty job at the location specified. Prior to obtaining work authorization through the H-1B visa, however, the individual must provide the employer with documentation (*i.e.*, copies of transcripts, current passport, *curriculum vitae*, and diplomas and degrees) to be submitted to the INS in support of the H-1B petition, demonstrating the individual's special attributes and qualifications for the specialty worker visa. Because the H-1B petition requires submission of information specific to the individual "specialty worker" for the particular job, a conditional offer of employment is made prior to securing the H-1B.

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[22] *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1999) (delineating aliens eligible for H1-B visa status).

[23] 8 U.S.C. § 1184(i) (1999).

As printed on the face of the INS "Notice of Action" dated June 27, 1996, notifying SFSU of Qu's H-1B petition approval, "Petition approval does not authorize employment. When the workers are granted status based on this petition they can then work for the petitioner, but only as detailed in the petition and for the period authorized." Therefore, Qu became eligible to work for SFSU only after completion of the entire process, *i.e.* approval of the H-1B petition, issuance of the H-1B visa, and admission into the U.S. on the H-1B visa.

The intersection, on the one hand, of 8 U.S.C. § 1324a (making it unlawful to hire unauthorized aliens) and 8 U.S.C. § 1324b (prohibiting citizenship status discrimination) with, on the other hand, the H1-B visa process (inviting specialty workers to immigrate to the United States) is a matter of first impression before OCAHO. We need to await proof to determine whether Qu's H1-B process was subject to a discriminatory intent at its threshold (*i.e.*, whether citizenship status discrimination can be found in the Labor Condition Application submitted to the Department of Labor). Before taking evidence, however, it is sufficient to note that even an SFSU conditional offer of employment to Qu prior to obtaining H-1B approval, would not necessarily have violated 8 U.S.C. § 1324a and/or 8 U.S.C. § 1324b. This is so because the nature of H-1B approval is dependent upon securing a particular worker for a specialty job. To reconcile the disparate impact of these Immigration and Nationality Act provisions (8 U.S.C. §§ 1324a and 1324b with 8 U.S.C. § 1101(a)(15)(H)(i)(b)), it must be determined whether work authorization as of the date of "hire" relates back to the date of "selection" so as to place the H1-B visa-holder on equal footing with U.S. Citizen applicants.[24]

III. Conclusion and Order

I conclude as a matter of law that I have jurisdiction over Complainant's action under *Ex parte Young* against the SFSU officials in their official capacities. Complainant is granted leave to amend the Complaint to add as respondents the four named state officials in their official capacity.

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[24] The Board of Alien Labor Certification Appeals (BALCA) addressed the issue of applicant selection and H1-B petition approval in *In re Montgomery College*, 94-INA-00584, 94-INA-00585 (Bd. Alien Lab. Cert. App. July 18, 1996), *available in* 1966 WL 15363. "The date employment began is not under any reasonable interpretation the selection date." *Id.*, at *3. When unable to ascertain a date of hire or offer, BALCA determined that the date commencing the validity period of the approved H1-B petition serves as the date of offer or selection, *i.e.*, the date of eligibility for employment. "[T]he Alien's [sic] 'selection' was contingent upon their receiving H-1B status from the INS, because they were unemployable without such status, and the Aliens were not offered positions or 'selected' until . . . they received H-1B status from the INS." *Id.*, at *3. "If the Aliens had not received valid H-1B status, they could not have been employed by the University and the positions would have been offered to other applicants." *Id.*, at *4. "[W]e find that the Aliens could not have been selected for employment until they were eligible for employment [,]" *i.e.*, when they received valid H1-B status. *Id.*, at *4.

Prior to scheduling an evidentiary hearing to determine liability as a matter of fact, my office will schedule a first telephonic prehearing conference in consultation with the parties. At the conference, the parties will be expected to address matters described at 28 C.F.R. § 68.13(a)(2), including, particularly, the likelihood of an agreed disposition.

Not later than July 26, 1999, each party will be expected to advise my office of the telephone number at which the party and/or counsel will be available for the purpose of scheduling the telephonic prehearing conference, and will provide the name of the representative, if any, who will participate at that conference.

Failing a prospective agreed disposition, Complainant will be expected to serve and file such amended Complaint as permitted by this order **not later than 15 days after the first telephonic prehearing conference**.

All pending motions not specifically addressed in this Order are denied.

SO ORDERED

Dated and entered this 14th day of July, 1999.

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Marvin H. Morse
Administrative Law Judge